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Supreme Court, U.S.
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No. 06-582

IN THE

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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Constitution

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A. The Court Should Decide This Case Along With *Hein v. Freedom From Religion Foundation, Inc.*

1. On December 1, 2006, this Court granted certiorari in *Hein v. Freedom from Religion Foundation, Inc.*, 433 F.3d 989 (7th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3065 (U.S. Dec. 1, 2006) (No. 06-157),[1] to determine whether federal taxpayers have standing to mount an Establishment Clause challenge to dollars spent on an executive program unconnected to a specific congressional grant. Judge Easterbrook in his opinion concurring in the denial of rehearing en banc in *Freedom from Religion* also referred to this case and stated that this Court should resolve the "related matters" presented in both cases. 447 F.3d at 989 (order denying reh'g en banc) (Easterbrook, J., concurring). For a number of reasons, the Court should follow Judge Easterbrook's suggestion and grant certiorari here as well.[2]

First, for the reasons noted by the Solicitor General in the *Freedom from Religion* petition, permitting the decision below to stand will likely make the Seventh Circuit a nearly-universal destination for taxpayer actions. *See* Petition for a Writ of Certiorari, *Grace v. Freedom from Religion Found, Inc.*, No. 06-157 (U.S. Aug. 1, 2006). Any federal taxpayer in that Circuit with a generalized grievance concerning the government's religion-related speech will be able to mount a *post hoc* challenge to any such program, in order to seek "restitution" from the grantee. The Court's decision in *Freedom from Religion* will not change that fact. This threat is particularly acute, moreover, because the Seventh Circuit has found taxpayer standing to challenge "*any* expenditure"

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[1] The case was originally captioned *Freedom from Religion v. Chao* and, more recently, *Grace v. Freedom from Religion.*

[2] Petitioner has attached a copy of the order denying rehearing en banc that was inadvertently omitted from its Petition Appendix.

related to religious expression, even "piddling" ones, such as the $448.38 that the Indiana Legislature spent in connection with its legislative prayer. *See Hinrichs v. Bosma*, 440 F.3d 393, 397-98 (7th Cir. 2006) (emphasis in original).

The Court, more importantly, will have difficulty setting forth a comprehensive and coherent doctrine of taxpayer standing in the Establishment Clause context in *Freedom from Religion* without addressing the issue presented in this case. This decision is markedly more expansive than, and quite different from, *Freedom from Religion*. Resolving the question in *Freedom from Religion*—whether taxpayers are allowed to challenge ongoing Executive Branch use of general appropriations—will inherently say nothing about the issue here; *i.e.*, whether a taxpayer may seek *reimbursement* from a private entity for *prior congressional* expenditures.

As reflected in the various amicus briefs filed by religious organizations and State Attorneys General, the issue here is more important, both jurisprudentially and in real-world effects, than *Freedom from Religion*. This case presents threshold issues concerning the scope of, and rationale underlying, a taxpayer's ability to challenge expenditures that allegedly violate the Establishment Clause. As established in our Petition, the rule that a taxpayer has standing to seek reimbursement by a private entity for already-expended funds necessarily must be premised on the erroneous notion that taxpayers have a cognizable interest in the financial status of the Federal Treasury. Pet. at 14-16. *Freedom from Religion* presents no comparable issue relating to the principles underlying taxpayer standing, but only the technical question of whether *Flast v. Cohen*, 392 U.S. 83 (1968), should be extended beyond its facts to reach purely Executive Branch decision-making. Additionally, because of the second question presented here, this case, unlike *Freedom from Religion*, provides the opportunity to reexamine the underpinnings of *Flast*, if the Court is unable

to reconcile that decision with its more recent precedent governing standing.

The Federal Respondent acknowledges that the "extraordinary ruling" here "clearly disregards this Court's taxpayer-standing precedents and departs from established principles of judicial restraint in constitutional cases" and that the decision "is likely to have a substantial chilling effect on the willingness of private [religious] organizations to participate as providers of secular government services pursuant to federal grants or contracts." Fed. Resp. Br. at 6, 17. The Solicitor General also recognizes that this case "raises separate and distinct separation-of-powers concerns" than those presented in *Freedom from Religion*. *Id.* at 18. Notwithstanding these differences, the Solicitor General nevertheless raises, without explanation, the possibility that "the Court's disposition of [*Freedom from Religion*] may provide guidance relevant to the Court of Appeals decision in this case and could potentially obviate the need for this Court's plenary review." *Id.* But it is not remotely possible that *Freedom from Religion* could affect or obviate the question presented here. Again, resolving whether taxpayers may stop ongoing Executive Branch spending necessarily cannot control or inform whether they may seek restitution for terminated congressional expenditures.

Indeed, even if the cases did overlap to the extent that the *Freedom from Religion* opinion might affect the "separate and distinct" question posed here, it would be far preferable to hear both cases roughly contemporaneously in the same Term than to place this case on hold pending resolution of *Freedom from Religion*. Any discussion in the *Freedom from Religion* opinion that could affect the outcome here would necessarily be *dicta* that is quite divorced from the facts. The more prudent and appropriate course would be to resolve the question of taxpayer standing to seek restitution in a case, such as this, which squarely presents that issue in a "factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian*

Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); *see also, e.g., Burton v. United States*, 196 U.S. 283, 295 (1905) (court should not decide constitutional questions unless "absolutely necessary to a decision of the case."); Fed. Resp. Br. at 16.

2. Even if viewed without reference to the pending *Freedom from Religion* decision, the opinion below plainly merits plenary review because it squarely conflicts with the Court's bedrock justiciability precedents and because it will significantly change the scope of litigation and remedies in Religion Clause cases.

As the Petition showed, this Court's precedent establishes that taxpayers have no standing to seek financial compensation for the Treasury from an innocent third party to "remedy" the Government's own constitutional violation. In such a lawsuit, there is no cognizable fiscal injury to the taxpayers, *see Frothingham v. Mellon*, 262 U.S. 447, 487 (1923), there is no possible redress to the taxpayers, *see Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 105 (1998), and there is no adversity against the Government which supposedly committed the violation, *see Muskrat v. United States*, 219 U.S. 346, 361 (1911). *See* Fed. Resp. Br. at 12-13. The court's decision also violates separation-of-powers principles by granting taxpayers and courts veto authority over the Government's enforcement and fiscal determinations. *See United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947); Fed. Resp. Br. at 14-15.

The Seventh Circuit's opinion also jeopardizes the financial well-being of the private organizations that perform many essential social services, while placing these organizations in the crosshairs in the well-funded arena of Establishment Clause litigation. The threat of financial ruin alone, oftentimes, will be sufficiently daunting for the organization to cede to taxpayer demands—even if the Government is in full compliance with the Constitution. And, because the taxpayers' claims are never moribund (the money in this case was already fully spent over two years

ago), the uncertain future liability will present too much risk for many organizations to accept government funding. Indeed, taxpayers can sit idly by while an organization unknowingly digs itself into financial ruin by accepting government money only to spring forward years later and demand repayment on behalf of the Government.

It is simply not true, as Plaintiffs contend, that "no religious institution that plans to use government money in a lawful manner need fear an order of restitution of those funds." Opp. Br. at 17. The private organizations themselves cannot violate the Establishment Clause, and they cannot, and cannot be expected to, guarantee the Government's compliance with the Constitution, particularly in a murky area such as the Establishment Clause. *See Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring in judgment) (in Establishment Clause disputes, "no exact formula can dictate a resolution . . . ."). Here, for example, Plaintiffs allege that the Constitution is violated simply because the *Government* failed to sufficiently *monitor* its funds, even if Notre Dame and the partnering institutions never spent a dime on any religious activity and even though the Government here audited Notre Dame and found no indication that it had failed to comply with the grant terms or otherwise misused federal funds.

Notre Dame is not voicing merely hypothetical concerns about possible future slippery slopes. Based on the Seventh Circuit's reasoning, religious institutions doing good work in the public interest are *now* being threatened with oppressive orders to pay the Government money they do not have. A district court in Iowa has already ordered a religious organization to pay the Government $1.5 million for providing prerelease rehabilitation services to prisoners on behalf of the State of Iowa in violation of the Establishment Clause. *See, e.g., Ams. United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 938 (S.D. Iowa 2006). In another pending lawsuit in federal

district court, *Pedreira v. Kentucky Baptist Homes for Children*, No. 00-210 (W.D. Ky. filed April 17, 2000), the taxpayer plaintiff is seeking to recoup $30 to $100 million from a religious organization that has used government and private funds to run, among other services, an orphanage in Kentucky for the last 137 years. *See* Brief for The Thomas More Law Center as *Amicus Curiae* Supporting Petitioner, at 4.

These religious organizations are not banks and do not invest the money they receive from the Government. Rather, these organizations *use* the government money to provide social welfare services such as counseling and treatment centers. The "public funds" that the taxpayers seek to recoup were spent long ago in providing these services. If an organization is ordered to "re-pay" the Government, that money has to come from cuts in the other services it currently is providing, and, if the award is large enough, the organization will cease to exist. This decision therefore represents a serious immediate threat to innumerable private organizations that are serving the public interest.

B. Plaintiffs Provide No Reason To Deny Certiorari.

Plaintiffs' Brief in Opposition does not suggest a vehicle problem, does not refute the merits of the Petitioner's arguments, and does not otherwise present any reason to deny certiorari.

1. Plaintiffs' primary argument against review is that the appeal is interlocutory and that therefore there are "too many potential variables" like "the issue of the appropriateness of the remedy of restitution." Opp. Br. at 5. This argument is beside the point. This dispute concerns the proper scope of a federal court's Article III jurisdiction. As this Court has held, "[t]he requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co.*, 523 U.S. at 94-

95 (internal quotation marks omitted). The decision below has *finally* adjudicated that threshold jurisdictional and standing issue; no "variables" remain as to that question.

Review is therefore warranted because this Court has routinely granted certiorari when jurisdictional issues are presented in an interlocutory posture. As the Court has noted, "the judgment of the Court of Appeals was not a final one, but we considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)); *see also Land v. Dollar*, 330 U.S. 731, 734 & n.2 (1947) ("Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue fundamental to the further conduct of the case.") (internal quotation marks omitted). Questions of standing unsurprisingly thus often are addressed by this Court on interlocutory review. *See, e.g.*, *Steel Co.*, 523 U.S. 83; *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Valley Forge*, 454 U.S. 464. Indeed, *Freedom from Religion* is in *exactly* the same procedural posture as this case. *See Freedom from Religion*, 433 F.3d at 997 (vacating judgment of dismissal and remanding case for determination of the merits).

2. Plaintiffs also contend that no lower court has directly rejected the Seventh Circuit's new-fangled remedy because the cases applying a different mootness analysis involved challenges to discontinued "government *practices*," rather than challenges to discontinued "financial aid." Opp. Br. at 11 (emphasis in original). This argument bears little consideration as the Seventh Circuit, because of the nature of taxpayer standing, threatens to become the universal destination for taxpayer actions. Moreover, the holding below is at odds with the results in those other Establishment Clause cases because it plainly authorizes challenges to prior religious *practices*, in the same way that it authorizes challenges to terminated religious funding. This is so

because virtually all government-sponsored religious practices, such as the legislative prayer in *Hinrichs*, entail *some* expenditure of public funds.

Indeed, the conflict among the lower courts here is, if anything, more obvious than it was in *Freedom from Religion*. As the grant in that case reflects, the Court's general practice is to review unusually broad and novel rules for taxpayer standing, such as those set forth in *Valley Forge* and *DaimlerChrysler Corp. v. Cuno*, __ U.S. __, 126 S. Ct. 1854, 1868 (2006), *before* they wreak havoc in lower courts.

3. Plaintiffs never directly refute any of Notre Dame's arguments or discuss this Court's justiciability precedent. Plaintiffs, instead, conclusorily rely on *Flast* and dismiss every other opinion of this Court as "simply not helpful." Opp. Br. at 7 n.4. But Plaintiffs, like the court below, fail to recognize that they "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). Plaintiffs' standing to seek recoupment on behalf of the Government cannot be bootstrapped to their standing to seek a *Flast*-type injunction against ongoing congressional expenditures. *See Cuno*, 126 S. Ct. at 1868. Nor is there any other basis for finding such standing.

a. The injury in *Flast* was the use of tax dollars in aid of religion and "an injunction against the spending would of course redress *that* [religious] injury." *Id.* at 1865. Plaintiffs, lacking legal support, appeal to "common sense" to argue that ordering the return of "funds to the federal treasury" also reduces the *Flast* injury because it ensures that "taxpayer money will not have been expended on the religious activity." Opp. Br. at 8, 9. But Plaintiffs' "common-sense" argument was correctly rejected by the court below, when it found that any non-monetary "injury" caused by spending money "for forbidden purposes" "*cannot* be rectified." Pet. App. 5a. Any prior religious activity cannot be cured or undone by requiring Notre Dame to write a check for an amount equivalent to the federal grant. If a

Presidential candidate uses federal funds to mount his campaign, "taxpayer dollars will have been expended" to subsidize that candidate's speech, even if the candidate later returns the money because it was improperly spent in violation of federal election laws. The subsequent reimbursement will cure only the Treasury's financial injury; it will not somehow "undo" the speech improperly purchased through public funds. This is particularly true in the religious context because, in most cases, the alleged religious activity would not have taken place but for the government grant. That money was spent and the "recouped" funds must come from another source, likely a cut in a current program.

The remedy is particularly inappropriate here because *Notre Dame*'s expenditure did not sponsor any religious indoctrination. Notre Dame passed the bulk of the federal funds to partnering institutions, and its only alleged sin is "fail[ing] to *monitor the partners* to ensure the federal grant money was not used" for religion. Opp. Br. at 15 n.18 (emphasis added). The payment of money by Notre Dame tomorrow cannot "cure" the religious injury caused yesterday by another institution's allegedly publicly-sponsored indoctrination.

Finally, as Notre Dame explained in its Petition—and not disputed by Plaintiffs—no Establishment Clause case would *ever* be moot if the court of appeals' decision stands. If the specter of improper "sponsorship" remains notwithstanding that the activity itself has concluded, taxpayers could challenge expenditures made by the First Congress, a high school benediction prayer that occurred decades ago, or a nativity scene that is no longer displayed in the town square. Such reasoning would work a sea change in constitutional litigation.

b. Plaintiffs admit, as they must, that their asserted interest is "to protect the federal treasury from the loss of taxpayer money." *See* Opp. Br. at 8 n.7. But this Court, in a variety of contexts, including Establishment Clause cases, has rejected the proposition that a taxpayer has a legally

cognizable financial interest in the Treasury. *See, e.g.*, *Valley Forge*, 454 U.S. at 485 n.20 (rejecting the assertion that, under the Establishment Clause, "the standing of a taxpayer is established by his continuing stake . . . in the disposition of the Treasury to which he has contributed his taxes"). Nor do Plaintiffs even attempt to explain how taxpayers may have a financial interest in the Treasury in Establishment Clause cases and not in any other instance. *See* Pet. at 29-30. Thus, as Notre Dame explained in its Petition, if *Flast* truly were based on taxpayers having a financial interest in the Treasury, as Plaintiffs suggest, it is irreconcilable with this Court's more recent precedent and should be reconsidered.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Plaintiffs contend that they still have a live controversy with the Government "because the Government willfully refuses to remedy its own Establishment Clause violation" by seeking monetary "compensation" from Notre Dame. Opp. Br. at 10. But the remedy sought *against* the Government for failure to take this self-help—*i.e.*, an injunction requiring it to seek compensation from Notre Dame—was properly rejected by the Seventh Circuit, and Plaintiffs have not sought review of that now-final determination. Accordingly, Plaintiffs do not have any remedy against the Government for its prior alleged violation. And Plaintiffs do not dispute the black-letter law establishing that there is no live case or controversy between parties if no remedy is sought or available for prior conduct. *See* Pet. at 18-19. Thus, since it is now law of the case that there is no remedy against the Government, there is simply no case or controversy between Plaintiffs and the Government.

Respectfully submitted,

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December 18, 2006

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

July 26, 2006

BEFORE

HON. JOEL M. FLAUM, *CHIEF JUDGE*
HON. RICHARD A. POSNER, *CIRCUIT JUDGE*
HON. FRANK H. EASTERBROOK, *CIRCUIT JUDGE*
HON. KENNETH F. RIPPLE, *CIRCUIT JUDGE*
HON. DANIEL A. MANION, *CIRCUIT JUDGE*
HON. MICHAEL S. KANNE, *CIRCUIT JUDGE*
HON. ILANA DIAMOND ROVNER, *CIRCUIT JUDGE*
HON. DIANE P. WOOD, *CIRCUIT JUDGE*
HON. TERENCE T. EVANS, *CIRCUIT JUDGE*
HON. ANN CLAIRE WILLIAMS, *CIRCUIT JUDGE*
HON. DIANE S. SYKES, *CIRCUIT JUDGE*

NO. 05-2749

JOAN LASKOWSKI and DANIEL M. COOK,

Plaintiffs-Appellants,

v.

MARGARET SPELLINGS, in her official capacity as Secretary of the United States, Department of Education,

Defendant-Appellee,

and

UNIVERSITY OF NOTRE DAME,

Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 03 C 1810—**Larry J. McKinney**, *Chief Judge*.

ORDER

On May 26, 2006 and May 30, 2006, appellees, University of Notre Dame, and Margaret Spellings, Secretary of the United States Department of Education, filed petitions for rehearing with suggestion for rehearing *en banc*. The panel voted to deny rehearing, Judge Sykes dissenting, but to issue the attached supplemental opinion, from which Judge Sykes also dissents.

A vote of the active members of the court on whether to grant rehearing *en banc* was requested, and a majority of the judges have voted to deny the petitions.** The petitions are therefore DENIED.

** Judges Manion, Kanne, and Sykes voted to grant the petitions for rehearing *en banc*. Judges Ripple and Williams took no part in the consideration or decisions of the petition.